No. 719

IN THE

Supreme Court

OF THE

United States

October Term, 1957

ROBERT E. LEE, individually, and as President of El Paso County Taxpayers Association, a corporation
HAROLD CHISMAN and
HARVEY A. SOLLO,
Petitioners.

vs.

THE CITY OF COLORADO SPRINGS, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

John H. Gately,
Counsel for Petitioners

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To the Honorable, The Supreme Court of the United States:

(1A)

The opinion of the Supreme Court of Colorado, the highest court of appellate jurisdiction in the instant case, is not as yet reported and is appended hereto. (Appendix 1)

(1B)

STATEMENT OF GROUNDS FOR JURISDICTION

I. The Supreme Court of Colorado entered its order of affirmance of the lower Court's decree on September 23, 1957.

II. A petition for rehearing was duly filed and an order denying the same was entered October 14, 1957.

III. The statutory provision relied upon by Petitioners to confer jurisdiction on this Court to review is 28 U. S. C. A. 1257 (3.)

(1C)

QUESTIONS PRESENTED FOR REVIEW.

The Supreme Court of Colorado has ignored federal questions of substance presented to it and decided them in a way not in accord with applicable decisions of this Court in the following matters:

1. They have denied Petitioners any remedy in the Courts of Colorado against the confiscatory and discriminatory rates charged by the Respondent.

2. The lower Court and the Supreme Court have refused to pass upon or follow and enforce the federal rights guaranteed to the Petitioner by the 14th Amendment to the Federal Constitution; that the federal questions were necessary for a proper determination thereof and that judgment could not be

rendered without deciding them. The federal questions being illegal discrimination in rates which deprives Petitioners of their property without due process of law and the equal protection of the law.

3. The Court in and by its decision has failed to give effect to the Contracts the Petitioners had with the Northfield Land and Water Company, thereby impairing the obligation of contract, prohibited by Article I, Section 10 of the United States Constitution.

(1D)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, ET CETERA WHICH ARE INVOLVED.

United States Constitutional provisions relied upon by the Petitioners are Section 1 of the Fourteenth Amendment, and Article I, Section 10 of the United States Constitution.

Colorado Revised Statutes, 1953, Vol. 5, Chap. 115-3-5; 115-3-2; 115-3-6; 115-7-2; 115-7-3, Colorado Rules of Civil Procedure, Rule 12 (f).

(1E)

CONCISE STATEMENT OF THE CASE

This case was filed by the named Petitioners for themselves and two hundred and forty others who were similarly situated, as a class suit, in behalf of all within the class, being users of water outside the city limits of Colorado Springs and supplied by the City.

The Petitioners were formerly supplied by the Northfield Land and Water Company, which was

purchased by the Respondents in April, 1949, and is still used to supply the Petitioners.

That on June 1, 1949, the Respondent, filed an application with the Public Utilities Commission of Colorado, was granted a certificate of convenience and necessity to operate the Northfield Land and Water Company in the area previously served by it. Under the laws of Colorado, no increase or change in rates is legal without the sanction and approval of the Public Utilities Commission. That without any submission to or approval of, the Public Utilities Commission, the Respondent on February 1, 1956, set up a new schedule of suburban rates as follows:

City Rates	Suburban Rates
First 500 cu. ft. @ 1.50	First 500 cu. ft. @ 2.25
over 500 cu. ft. .16 per ft.	over 500 cu. ft. .20 per ft.

Petitioners herein being under the suburban rates. That the service is furnished to both city and suburban users without any difference, and under the same circumstances; that parts of the city are beyond the area where water is furnished to Petitioners and in some places such areas surround Petitioners.

The raise in rates was contrary to the contracts Petitioners had with the Northfield Land and Water Company, the Statutes of Colorado, and to the common law regarding discrimination between parties who are under the same or similar circumstances.

Respondent filed a motion to dismiss, based on a lack of jurisdiction. Petitioners filed a motion to strike the motion to dismiss under Rule 12 (f) of the Colorado Rules of Civil Procedure, but the Court refused to consider the same. After hearing the motion

to dismiss, the Court allowed the same and found that it was necessary to submit any objections that the Petitioners might have to the rates to the City Council of Colorado Springs, that they alone had authority to revise the rates.

Appeal was taken to the Supreme Court of Colorado and they upheld the lower Court. Petition for rehearing was filed and passed upon without opinion by the Supreme Court of Colorado.

Petitioners had raised and argued the Federal questions in the Complaint, in the lower and the Supreme Court and they both refused to consider and pass upon the questions raised.

(F)

STAGE OF PROCEEDINGS THE FEDERAL QUESTIONS RAISED.

The Federal questions were raised by the Complaint filed in the District Court, Page 3, Paragraph 9 (P. 11).

They were next raised in the original Brief filed in the Supreme Court of Colorado, point 2, "The City of Colorado Springs is bound by the Contracts of the Northfield Land and Water Company that they had with their customers," and the decision of the Court is contrary thereto which is prohibited by Article 1, Section 10 of the United States Constitution (p. 12). It also charged their actions violate the Fourteenth Amendment of the United States Constitution.

The original Brief, Point 4, charges "The discrimination in rates between users inside and outside the city limits is contrary to the Statutes of Colorado

and the United States Constitution." The original Brief, Point 4, States, "The Court by its decision in dismissing the complaint denied to the Plaintiff in favor of a class inside the boundaries of said City contrary to the Fourteenth Amendment to the United States Constitution."

The Federal question was also argued in the reply Brief, Pages 5, 8, and 9, Point 2.

The Petition for Rehearing was entirely predicated on the Federal questions, and the Courts refused to pass upon them.

(H)

ARGUMENT

I

PETITIONERS WERE DENIED THEIR REMEDY IN THE COURTS OF COLORADO.

When the City took over the Northfield Land and Water Company they obtained a P.U.C. certificate and the rates were set by it. They arbitrarily raised the rates in January, 1955, without consulting P.U.C. or obtaining its approval. The rates were therefore illegal and void. C.R.S. 115-3-1.

The Statutes of Colorado provide that the Public Utilities Commission shall set all rates for public utilities and prevent unjust discrimination and extortions in rates. C.R.S. 115-3-2. No change in rates is authorized without thirty days notice to the Commission and the public. C.R.S. 115-3-4.

The Supreme Court of Colorado has held in the case of **Lamar vs. Wiley**, 80 C. 18, 248 P. 1009,

that a municipal corporation, operating as the Respondent was here, is a public utility and cannot fix rates itself for extraterritorial service outside its boundaries, except with the approval of the Public Utilities Commission of Colorado.

The rate so set, by the City, herein complained of, was illegal under existing statutes and decisions of the highest court of the State of Colorado. The statutes of Colorado provide that the Public Utilities Commission has jurisdiction to make reparations when complaint is made to it, (C.R.S. 115-6-19), and that remedy shall be cumulative and in addition to any other remedy. The Statute also provides, (C.R.S. 115-7-2) — "such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or other injury caused or resulting therefrom. That, if the Court shall find that the act was willful, the Court in addition to actual damages, may award damages for the sake of example and by way of punishment."

"**An Action to Recover** such loss, damage or injury, **may be brought in any court** of competent jurisdiction **by any corporation or person.**" (Emphasis Ours.)

The statute thereby giving Petitioners a right to go to Court initially.

The following paragraph, C.R.S. 115-7-3, reiterates that the actions shall all be cumulative and that the State shall have a right of action. In paragraph two thereof, the Statute specifically states that "—a suit for the recovery of one penalty shall—."

The subsequent paragraph provides for action by the State against the public utility.

The Colorado Supreme Court has by the decree herein complained of, held that Petitioners have no right of action under the statute, contrary to its express wording, but, must go before the City Council of the City of Colorado Springs. But nowhere in the Charter or Ordinances has the City Council any authority to hear or pass upon any objection to rates set forth or specified by them, particularly on water rates.

We therefore respectfully submit that the Petitioners herein, under the decision as rendered in the Supreme Court of Colorado, directing the Petitioners to go to the City Council is contrary to the Statutes of the State of Colorado, and their former decisions.

Bonfils vs. P.U.C. 67 Colo. 563, 189 P. 775.

It places the Petitioners in a position where they have no recourse, no forum and no remedy. A denial of the equal protection clause of the United States Constitution.

Great Northern Ry. Co. vs. Sunburst Oil and Refining Company, 387 U. S. 358, 367.

The Supreme Court of Colorado has heretofore, in **Lamar vs. Wiley,** Supra, interpreted the Statute, C.R.S. 115-3-7, as giving the Public Utilities Commission jurisdiction to hear such complaints, but by its present decision, it has held that the Statute says, go to the City Council. In **Spears vs. Public Utilities Commission,** 67 Pac. 2. 1029, 100 Colo. 369, it states that Courts of equity have authority to enjoin enforcement or collection of unreasonable rates, affirming the statute that gives the Petitioners a right to go to Court to correct illegal rates. In the instant case they were denied that right.

Petitioners have therefore been denied their right to be heard, contrary to the Fourteenth Amendment to the United States Constitution.

Brinkerhoof-Faris Company vs. Hill, 281 U. S. 673, 678, 679, 682.

II.

THE COURTS OF COLORADO HAVE REFUSED TO PASS UPON, OR ENFORCE, THE RIGHTS OF PETITIONERS ARISING UNDER THE FEDERAL CONSTITUTION.

This Court's judgment is invoked because the state court has denied to the Petitioners their rights guaranteed them by the United States Constitution. This Court has heretofore, under similar conditions, enforced the same.

Demarest vs. City Bank Farmers Trust Co. 64 S. Ct. 384, 321 U. S. 36.

The federal questions were properly raised in the State Courts, by asserting the federal questions in the Complaint (P. 11), and in the original and reply briefs filed in the Supreme Court of Colorado and in the Petition for Rehearing (P. 44), as enumerated in (F) Federal Questions. We will therefore not burden the Court with a repetition thereof.

The question of illegal discrimination, contrary to the 14th Amendment of the United States Constitution, should have been passed upon by the Supreme Court of Colorado to properly and intelligently decide the issues presented to it. Yet, nowhere in their opinion do they even mention the same.

Obviously, their thought must have been, that if they only set out a matter of procedure in their opinion, this Court would not take jurisdiction. But, we submit, the question passed upon by them, a matter of procedure, ignored the federal questions presented, contrary to their previous opinions **(Lamar vs. Wiley,** Supra, **Colo. Tel. Co. vs. Wilmore,** 53 Colo. 501, 129 P. 204, **Wolverton vs. Mt. States Telephone and Telegraph Company,** 58 Colo. 58, 142 P. 165.) and the statutes of Colorado, which very obviously give the consumer, or user, a right to go into Court to air his grievances and seek redress as we have heretofore pointed out (Point I, Argument.)

We therefore urge, that the ground upon which they allegedly based their opinion was not substantial, or sufficient and that, therefore, this Court should take jurisdiction.

Williams vs. Kaiser, 65 S. Ct. 363, 323 U. S. 471

International Steel and Iron Co. vs. National Surety Company, 56 S. Ct. 619; 297 U. S. 657.

We respectfully submit, that by its decision, the State Court has denied Petitioners a federal right especially set up and if enforced would require a judgment different from the one rendered, **Young vs. Ragen,** 69 S. Ct. 1073, 338 U. S. 285, thereby denying Petitioners a federal right.

It seems obvious, that the decision as rendered, in denying the Petitioners any right to any hearing on the federal questions, the State Court has gone far afield in its attempt to avoid passing on the federal question presented, and was seeking to evade the jurisdiction of this Court. The decision rendered, is

so palpably unfounded upon any reasonable basis, under their former decisions and the Statutes, it cannot be presumed to have been considered.

Johnson vs. Rick, 11 S. Ct. 111, 137 U. S. 300.

We respectfully submit, that the city ordinances setting up the different rates for those inside the imaginary boundaries of the City and the rates for the Petitioners who are outside, are discriminatory and invalid.

This Court has heretofore found that neither the legislature nor any commission, can establish arbitrarily and without regard to justice and right, any tariff or rate. That this Court will pass upon the validity of a Statute (ordinance) and determine its legality, has been upheld many times as being a judicial question.

Jett Bros. Co. vs. City of Carrolton, 252 U. S. 1, 6.

Chicago, Milwaukee, and St. Paul Ry. Co. vs. Minnesota, 10 S. Ct. 702, 134 U. S. 418.

There should be an ultimate remedy for the parties aggrieved, especially in the Courts of the United States, where such rates deprive a party of his property without due process of law.

Chicago, Milwaukee, and St. Paul Ry. Co. vs. Minnesota, Supra.

Ex Parte Young 209 U. S. 123.

In the instant case, the Petitioners invoked the apparent judicial remedy provided by statute and the former decisions of the State Supreme Court and this Court.

This Court has recognized the distinction between the "primary" jurisdiction of commissions and that an objector to rates may file a suit in a court, without first going before a commission. It has also held that the Courts should follow the language of the Statutes, which was not done in the State Court.

B & O Ry. Co. vs. Brady, 53 S. Ct. 44, 288 U. S. 448.

Especially when the objection to the rate is grounded upon the Petitioners objection of discrimination.

Pa. Ry. Co. vs. Puritan Coal, 35 S. Ct. 484, 237 U. S. 121.

Ill. Cent. vs. Mulberry Hill Coal Co. 35 S. Ct. 760, 238 U. S. 275.

That rates as charged against the Petitioners are willfully discriminatory and in violation of all decisions of this Court, we submit, is exemplified by the statement made by the City Manager of the Respondent, when complaint was made on the rate charged:

"Annex to the City or we will double your present rate."

Bell Telephone Co. vs. Utilities Commission, 309 U. S. 30.

Mo. Pac. Ry. Co. vs. Nebr., 164 U. S. 403.

These things are not countenanced by the freedom-loving people of this Country, and this Court has always been open to prevent such high-handed and illegal methods under the provisions of the 14th Amendment to the United States Constitution.

Sioux City Bridge Co. vs. Dakota City, 43 S. Ct. 190, 260 U. S. 441.

Cumberland Coal Co. vs. Board, 284 U. S. 23, 76 L. Ed. 146.

Unless this Court corrects the decision of the State Court, herein, Petitioners will have been deprived the protection of the 14th Amendment by losing two years refunds because of the state statute of limitations, and will have been denied the equal protection of the law.

III.

THE STATE COURT HAS REFUSED, BY ITS DECISION TO PROTECT PETITIONERS RIGHTS AS GUARANTEED BY ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

The Northfield Land and Water Company had written contracts with the Petitioners which were taken over by the Respondent, and it became bound thereby. This take over agreement was approved by the Colorado Public Utilities Commission by its official order. This order also provided that:

> "It is further ordered that the tariff or rates and regulations of the transferror shall become and remain those of the transferree, (Respondent) until changed according to law and the rules and regulations of this commission.—It is further ordered that the City of Colorado Springs file annual reports with the Commission and do all other things

in compliance with the Commission's requirements."

This, then, was a contract right of Petitioners. Respondent, by arbitrarily almost doubling the charges for water to Petitioners by its arbitrary resolution or ordinance, without submitting it to the Public Utilities Commission of Colorado, for approval, violated that Contract obligation, which should be reversed by this Court.

People of Puerto Rico vs. Russell & Co., 62 S. Ct. 784, 315 U. S. 610.

City of Waterton vs. Waterton Lt. & Power Co., 173 N. W. 739, 740; 42 S. D. 220, 12 C. J. P. 1035, Note 83.

King vs. Council of Augusta, 48 S. Ct. 489, 277 U. S. 100.

Hershey vs. Cole 20 P2 972; 130 Calif. Ap. 683.

CONCLUSION.

The Petitioners herein therefore respectfully submit that the State Courts of Colorado have deliberately avoided deciding the federal questions presented to them. These questions were presented at the inception of the suit, through all of the Briefs, and finally in the Petition for Rehearing. There can therefore be no question as to the timeliness of raising the federal questions. Nor, can there be any question of the substance of the federal rights urged by Petitioners, nor that those rights had to be considered by the State Court for a proper determination of the case.

We also submit, that by their decision, under the applicable Statutes, they have not only denied to the Petitioners equal protection of the law, but, denied any protection, as guaranteed by the 14th Amendment to the United States Constitution. By their decision they have foreclosed the Petitioners from any judicial remedy. The Statutes of Colorado state that Petitioners may go to Court on objections to illegal rates, but the decision in the instant case says they must go to the City Council, but there is no machinery or law of procedure set up by the Respondent that they may follow to enforce their rights before the City Council. They are therefore without remedy.

This is contrary, as this Court well knows, to all of the fundamental laws of this Country.

We also respectfully submit that there can be no question but that the rates set up by the Respondent are discriminatory, oppressive, and confiscatory, and as shown have been used as a threat to force the Petitioners to annex to the City of Colorado Springs,

The Supreme Court of Colorado has thereby decided adversely to the rights of the Petitioners, in a way contrary to and not in accordance with, the applicable decisions of this Court, wherein it has, as heretofore shown, held that a person wronged has no right to his day in Court.

Only by this Courts reversing the decree of the Supreme Court of Colorado may Petitioners obtain their rights guaranteed by the fundamental law of the land, the Constitution of the United States. We therefore respectfully request this Court to take jur-

isdiction of this case so that the grievous error committed by the Supreme Court of Colorado may be corrected.

Respectfully submitted,

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Appendix 1.

No. 18088

MR. CHIEF JUSTICE MOORE Delivered the opinion of the Court.

Plaintiffs in error were Plaintiffs in the trial court. In their complaint they sought to prevent the City of Colorado Springs from charging rates for water service outside the corporate limits of the city which were in excess of the rates collected for the same service supplied to customers within the corporate limits. They allege that the rates to which they object are discriminatory and ask the court to enjoin the collection thereof. They further ask for an accounting and a refund of monies theretofore collected from them by the city for said water service.

The City of Colorado Springs filed a motion to dismiss. The pertinent ground stated in the motion was that the complaint failed to state a claim upon which relief could be granted. The trial court sustained the motion to dismiss and entered appropriate judgment.

We agree with the trial court on this issue, and the judgment accordingly is affirmed.

MR. JUSTICE HOLLAND, MR. JUSTICE HALL, and MR. JUSTICE FRANTZ concur.

Appendix 1A.

MEMORANDUM OF REMARKS OF JUDGE MEIKLE MADE AT THE OPENING OF COURT ON THE 9TH DAY OF JULY, 1956.

Case Number 34559, Lee, et al, against the City of Colorado Springs. This is a matter which was argued last Monday and it is entitled a complaint for accounting. It is a case brought by water users outside of the City of Colorado Springs.

The motion to dismiss which was filed sets forth three grounds. One, that the Court is without jurisdiction; two, that the complaint fails to set forth a claim upon which relief can be granted; the third ground—the Court isn't concerned with that.

The complaint alleges and the attorney for the Plaintiffs argued that the City of Colorado Springs is a home-rule city and the owner of water rights, is a public utility and under the supervision of the Public Utilities Commission in furnishing water outside the City of Colorado Springs. The attorney for the City denied that it is a public utility and that the Public Utilities have no jurisdiction over the rates or no regulation where the City is furnishing surplus water to users outside of the City.

The City Council serves as a Public Utilities Commission with the City and its utilities. The objection that the Court is without jurisdiction of the subject matter is based on the grounds that the Plaintiffs have not exhausted their administrative remedies. It seems to me that that ground is good and that their first should be a hearing before the City

Council sitting as a Public Utilities Commission if there is some complaint as to the rates being charged and, from that decision, an appeal may be had to this Court.

This matter of jurisdiction is not an open and shut matter and the Court feels that, in fairness to all parties, the Court should pass upon the second ground.

It may be argued, and probably with some force, that if the Court holds it has no jurisdiction then the Court should not pass on any matters in connection with the suit. However, it is very plain to the Court that the relationship between the City and users of water outside of the City is a matter which will have consideration of our Supreme Court and, if the Court is in error in ruling on the second ground, the Supreme Court will disregard it. They might criticize the Court for ruling on the second ground. So, that might as well be determined by the Supreme Court if the case is taken to the Supreme Court.

So, the Court finds that the second ground in the motion—that the complaint fails to state a claim upon which relief can be granted—is sustained also.

So, the motion to dismiss will be sustained; the case will be dismissed.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR RESPONDENT IN OPPOSITION

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v.

THE CITY OF COLORADO SPRINGS, a Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Supreme Court of Colorado is reported at 315 P.2d 822 (1957), and is quoted in Appendix 1 of the Petition. It has not as yet been reported in the official state reporter.

Jurisdiction

Respondent denies that this Court has jurisdiction under the statute cited in the Petition. 28 U.S.C. 1257(3)(1952).

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are article I, section 10 of the United States Constitution, and the 14th amendment thereto; and article V, section 35 of the Colorado Constitution. The statutory provisions involved are section 1257 of title 28 of the United States Code, and sections 115-7-1 and 139-32-1(39) of the Colorado Revised Statutes of 1953. Rule 106(a)(4) of the Colorado Courts is also involved. The pertinent text of these provisions is set out in the Appendix, *infra* at 12. In addition one ordinance is involved, Ordinance No. 2270 of the City of Colorado Springs, effective February 1, 1956. The pertinent part of this ordinance appears on page 4 of the Petition.

Questions Presented

1. Where the Supreme Court of Colorado, applying Colorado case and statutory law, has allowed a municipality operating a water system to raise its prices to nonresident consumers, should this Court overrule that determination of state law?

2. Where the Supreme Court of Colorado has failed to consider Federal questions allegedly raised by the consumers, and it appears that the reason for this failure to consider was that the questions were not timely and specifically raised according to the requirements of Colorado law, should this Court consider the Federal questions?

3. If both these jurisdictional deficiencies are overcome, does it also appear that there is sufficient merit in Petitioners' constitutional objections to warrant this Court's discretionary grant of review by certiorari?

Statement of the Case

Prior to the year 1949, what are now parts of the City of Colorado Springs (Respondent) and surrounding suburbs were supplied with water by the Northfield Land and

Water Company (Northfield), a privately owned utility company regulated by the Colorado Public Utilities Commission (Commission). In that year, Respondent purchased Northfield for the purpose of expanding its city water supply.

To protect itself against the possibility that it might be subject to Commission regulation under some broad language of a 1926 Colorado Supreme Court case (*City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 248 Pac. 1009 (1926)), Respondent applied to the Commission for a certificate of public convenience and necessity to operate Northfield, which certificate was duly granted. In 1951 the Colorado Supreme Court decided the case of *City of Englewood* v. *City & County of Denver*, 123 Colo. 290, 229 P.2d 667 (1951), which greatly restricted the *City of Lamar* case, and made it absolutely clear that under the Colorado statutes Respondent was not subject to Commission regulation. The following year, the Supreme Court affirmed the *City of Englewood* holding with respect to Respondent. *Colorado Springs* v. *Public Utilities Commission*, 126 Colo. 265, 248 P.2d 311 (1952).

Relying on the *City of Englewood* and *Colorado Springs* cases, Respondent raised the rates for suburban water users in 1956 to the schedule shown on page 4 of the Petition. The reason for the raise was that the city water system was being operated at a deficit. The reason for the difference in rates for city and suburban users was that the price of acquiring and developing the water system had been paid from municipal funds, and suburban users pay no city taxes.

Petitioners are suburban water users who, under the new schedule, are required to pay higher rates. They initiated this action for themselves and 240 others by filing a Complaint in the District Court of El Paso County, Colorado, seeking an injunction against the increased rates, a return

of moneys paid because of the increase, interest on said sum, and a penalty. The Complaint was dismissed on Respondent's motion by the District Court, and Petitioners appealed to the Colorado Supreme Court, which affirmed, holding that Petitioners had failed to state a claim upon which relief could be granted. Petition for rehearing was denied, and Petitioners now seek certiorari in this Court.

ARGUMENT

I. The Decision Below Was Merely a Construction of State Statutes, Which Is Not Reviewable by This Court

The jurisdiction of the Supreme Court to review decisions of state courts by writ of certiorari is found in 28 U.S.C. § 1257(3)(1952). Nowhere in this Federal statute is jurisdiction granted to the Court to review decisions of state courts which merely interpret and apply state statutes. In fact, this Court has specifically said that it will accept the construction of state statutes by the highest court of the state, even though that construction may not agree with its own opinion. *Great Northern Ry. Co.* v. *Sunburst O. & R. Co.*, 287 U.S. 358, 362 (1932); *Supreme Lodge, K.P.* v. *Meyer*, 265 U.S. 30, 32 (1924).

In the instant case, the Supreme Court of Colorado merely interpreted and applied two Colorado statutes. COLO. REV. STAT. §§ 115-7-1, 139-32-1(39). The reason that the Court did not cite the statutes or spell out its construction of them is that it had previously done so in the case of *City of Englewood* v. *City & County of Denver*, 123 Colo. 290, 229 P.2d 667 (1951), and had related the *City of Englewood* holding specifically to the Respondent in *Colorado Springs* v. *Public Utilities Commission*, 126 Colo. 265, 248 P.2d 311 (1952).

In the *City of Englewood* case, Denver had purchased a

private water company which served not only its own residents but residents of the adjoining community of Englewood as well. Denver raised the rates for Englewood and Englewood objected that under the earlier case of *City of Lamar* v. *Town of Wiley*, 80 Colo. 18, 248 Pac. 1009 (1926), the rate increase was not valid unless approved by the Public Utilities Commission.

The *City of Lamar* case had appeared to hold that the supplying of electric power by a municipality to consumers outside the city was subject to Commission regulation. But the Court in *City of Englewood* determined that the *City of Lamar* case was not controlling, and held that under article V, section 35 of the Colorado Constitution, Commission regulation was prohibited where Denver supplied its surplus water to nonresident consumers. The Court also held that, even if the Constitution did not prohibit Commission regulation, such regulation was not authorized by statute, since in operating its water company to supply consumers outside the city of Denver was not a "public utility" within the meaning of the Colorado statute which empowered the Commission to regulate "public utilities." Colo. Rev. Stat. § 115-7-1; *City of Englewood* v. *City & County of Denver*, 123 Colo. at 297-300, 229 P.2d at 671. The Court further held that Colo. Rev. Stat. § 139-32-1(39) allows cities to supply water to consumers outside the city limits, and to set whatever rates they wish, free from regulation by the Commission. *Id.* at 301, 229 P.2d at 673. The statutes cited on pages 6 and 7 of the Petition, relating to regulation of public utilities by the Commision, are therefore not applicable to this case.

The year following the *City of Englewood* case, the Colorado Supreme Court considered the very water system involved in this case. It determined that the supplying of

water by Colorado Springs to consumers outside its boundaries is not subject to Commission regulation, saying:

> "It is our opinion that the decision in *Englewood* v. *Denver*, supra, is controlling in the present case in every respect." *Colorado Springs* v. *Public Utilities Commission*, 126 Colo. 265, 266, 248 P.2d 311 (1952).

The above decisions make it clear that in deciding the instant case, the Court was merely reapplying its previous interpretation of the Colorado statutes to the extra-territorial supply of water by Colorado Springs. Such application was so plain as to warrant neither lengthy discussion nor citation or authorities.

II. The Federal Questions Now Relied On by Petitioners Were Not Properly Raised in the Courts Below and Were Not Considered and Passed On by the State Court.

The interpretation and application of a state statute by the highest court of that state is reviewable on writ of certiorari if it appears that the statute is thereby made repugnant to the Constitution of the United States or a constitutional right, privilege or immunity is thereby abridged. But in order for review to be had on these grounds it is necessary that the validity of the statute must have been "drawn in question" or the Federal right, privilege or immunity must have been "specially set up or claimed." 28 U.S.C. 1257(3)(1952). This requires that the Federal question shall have been framed with particularity, *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); *Harding* v. *Illinois*, 196 U.S. 78, 86 (1904), and at the correct time and in the correct manner according to state law. *Edelman* v. *California*, 344 U.S. 357, 358 (1953); *Pennsylvania R.R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-63 (1936).

The rule in Colorado is that an issue not raised in the trial court may not be considered by the state Supreme Court. *Lambert* v. *Haskins*, 128 Colo. 433, 263 P.2d 433 (1953). This rule has been specifically applied to the raising of constitutional questions. *Johnson* v. *People* ex rel. *Kelly*, 96 Colo. 175, 40 P.2d 615 (1935); *Beneficial Loan & Investment Co.* v. *Ira*, 75 Colo. 379, 226 P.2d 136 (1924).

Petitioners now appear before this Court and raise the following constitutional objections:

(1) That Respondent has impaired the obligation of contracts, in violation of article I, section 10 of the United States Constitution.

(2) That Respondent has denied to Petitioners due process of law, in violation of the 14th amendment to the United States Constitution.

(3) That Respondent has denied to Petitioners equal protection of the laws, in violation of the 14th amendment to the United States Constitution.

These constitutional objections were not raised with specificity in the trial court, and for that reason were not considered and passed on by the Colorado Supreme Court. The only assertion of a constitutional objection before the trial court is the general allegation in paragraph 9 of the Complaint that "... said city is charging rates that are confiscatory of the rights and property of the plaintiff herein, contrary to the 14th Amendment to the United States Constitution." (R. 10). This omits any mention whatsoever of the impairment of contracts objection under article I, section 10, which was first raised in the brief filed with the Colorado Supreme Court. It is clear that under Colorado law this improperly raised objection could not be considered, and was not considered, by the state Supreme Court.

Moreover, it is apparent that the Colorado Supreme Court also determined that the blanket assertion in the trial court that the city had violated the 14th amendment had not raised with sufficient specificity the equal protection and due process objections. To be sure, these objections were subsequently fully and specifically pressed in Petitioners' brief before the state Supreme Court. See Petition at 5. But this was too late. The Supreme Court of Colorado dismissed the case with a short three paragraph opinion, in which the constitutional issues were not even mentioned. The only conclusion to be drawn is that the Colorado Supreme Court rested its decision squarely on *City of Englewood* v. *City and County of Denver*, and *Colorado Springs* v. *Public Utilities Commission*, *supra* at 4-6, which merely interpreted and applied state statutes, and did not deal with the Federal questions since they were not properly raised at the trial level as required by state law.[a] The decision as to whether the Federal questions were properly raised for consideration under state law belonged to the Colorado Supreme Court. This Court has held that it will not review a Federal question which was not considered by the state court because not raised at the correct time and in the correct manner according to state law. Cases cited *supra* at 6.

III. There Is No Ground for a Claim of Violation of Petitioners' Constitutional Rights

Even if it be assumed that the Federal questions were properly raised and considered by the court below, a brief examination of the merits of Petitioners' claims shows that there is absolutely no ground for a claim that Petitioners' constitutional rights have been violated.

Petitioners' three constitutional objections (*supra* at 7) will be separately considered:

1. *Impairment of Contracts:* Petitioners assert that by raising their water rates Respondent has unconstitutionally impaired the obligation of contracts. The "contract" which Petitioners claim Respondent has impaired is the order of the Colorado Public Utilities Commission, quoted on page 13 of the Petition. But the orders of a state commission are not "contracts" within the meaning of the constitutional provision, and nowhere has that term been so broadly interpreted. Even if the Commission's order were considered a contract, it was not a valid contract, since the Colorado Supreme Court, interpreting state law, has held that the Commission has no jurisdiction over Respondent's operation of its water company. *Colorado Springs* v. *Public Utilities Commission*, 126 Colo. 265, 248 P.2d 311 (1952). See discussion *supra* at 5-6.

Petitioners also mention the old written contracts which Northfield had with its consumers, with the possible inference that perhaps these were the contracts which were impaired. But there is no showing that by these contracts Northfield obligated itself to maintain its current rates in perpetuity, and in fact it did not. Moreover, Respondent was not, and never became, a party to those contracts, which ceased to exist as legal obligations when Northfield passed out of existence in 1949.

2. *Due Process:* Petitioners assert that by raising their water rates Respondent has deprived them of property without due process of law. But Petitioners are not denied a remedy if they wish to challenge the rates. The procedure whereby rates of a utility not subject to state Commission regulation may be challenged at a hearing before the city council has been spelled out by the Supreme Court

of Colorado, *Bennett* v. *Mountain S. T. & T. Co.*, 121 Colo. 325, 331-33, 215 P.2d 714, 717 (1950), and recognized as applicable to the instant case by the trial court. See Petition at 18-19. From the record built up at such a hearing, Petitioner has a right of appeal to the courts under Rule 106(a)(4) of the Colorado Rules of Civil Procedure. In this case, however, there has been no hearing, and no introduction of evidence to show that the rates charged Petitioners were unreasonable. The only thing the courts below had to go on was the allegations in Petitioners' complaint, which they correctly held failed to state a claim upon which relief could be granted.

3. *Equal Protection:* Petitioners assert that by charging them higher water rates than city consumers, Respondent has denied them equal protection of the laws. The equal protection clause is not violated, however, by every classification. "It is only when the variations are arbitrary and without reasonable legal basis that an unconstitutional discrimination occurs." *United States* v. *Burnison*, 339 U.S. 87, 95 (1950); *Watson* v. *Maryland*, 218 U.S. 173 (1910).

There is no showing on this present record that it is unreasonable for Petitioners to pay higher water rates than city consumers. There is no evidence, such as might be introduced at a hearing before the city council, that the cost of supplying Petitioners with water is no greater than that of supplying city consumers. Moreover, even if such evidence could be furnished, the classification would still not be unreasonable. Petitioners live outside the city, and pay no city taxes. Northfield was acquired by Respondent at a cost of $400,000 to the city, and has been operated yearly at a deficit which is made up out of municipal funds. It would be foolish indeed to expect Petitioners who pay no city taxes to receive water service at the same rates as city consumers who do pay taxes.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Constitutional Provisions

"No state shall . . . pass any . . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1.

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"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

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"**Delegation of Power**—The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." Colo. Const. art. V, § 35.

Statutes

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 62 Stat. 929 (1948), 28 U.S.C. § 1257 (1952).

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"**Enforcement of laws.** It is hereby made the duty of the Commission to see that the provisions of the constitution

and statutes of this state affecting public utilities . . . are enforced and obeyed. . . ." COLO. REV. STAT. 115-7-1 (1953).

. . . . . .

"**Powers of governing bodies.**—The governing bodies in cities and towns shall have the following powers:

". . .

"(39) **Supply water to outside consumers.**—To supply water from their water systems to consumers outside of the corporate limits of the cities and towns; and to collect therefor such charges and upon such conditions and limitations as said towns and cities may impose by ordinance." COLO. REV. STAT. 139-32-1 (1953).

Court Rule

"In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:

". . .

"(4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion. . . ." COLO. SUP. CT. RULE 106, found at 1 COLO. REV. STAT. 99 (1953).